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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RUSSELL CREEK LAND COMPANY
AND BBF, INC.,

Petitioners,

v.

CHARJUAN, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF CABELL COUNTY,
WEST VIRGINIA

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October 4, 1982

QUESTIONS PRESENTED

1. Whether notice to landowners of the impending sale of their real estate for delinquent taxes solely by publication in local newspapers and by posting on a door of the local courthouse deprives them of notice and an opportunity to be heard as contemplated by the due process clause of the Fourteenth Amendment to the Constitution of the United States and this Court's decisions in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950), and its progeny.

2. Whether, after the sale of real property to the state for delinquent taxes, the failure to notify the "prior" landowner in any manner of the latter's statutory right to redeem the property from the state deprives such landowner of a statutory entitlement without the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and this Court's decisions in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950), and its progeny.

All parties to the proceeding in the court whose judgment is sought ot be reviewed are included int he caption of this case, except Smith-Eckard Corporation which, it is believed, has no interest in the outcome of this petition.

The petitioner, BBF, Inc. is a wholly owned subsidiary of Borden, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE

CIRCUIT COURT OF CABELL COUNTY,

WEST VIRGINIA

The petitioners, Russell Creek Land Company and BBF, Inc., respectfully pray that a writ of certiorari issue to review the final order and decision of the Circuit Court of Cabell County, West Virginia, entered in this proceeding on November 6, 1981.

OPINION BELOW

The Circuit Court of Cabell County, West Virginia, did not render a published opinion; however, the final order and decision entered by that Court appears in the Appendix hereto. The Supreme Court of Appeals of West Virginia denied the petitioners' first and second petitions for appeal and supersedeas. That Court merely announces such denials in open court and does not issue any written orders or any other instrument evidencing denials of petitions for appeal and supersedeas; however, counsel for the petitioners was orally informed on July 6, 1982, by the Clerk of the Court that the second petition had been denied. Further notice of the denial was published in the private Syllabus Service of the court's action taken on matters before it which apears in the Appendix.

JURISDICTION

The final order and decision of the Circuit Court of Cabell County, West Virginia, was entered on November 6, 1981. The petitioners timely filed a petition for appeal and supersedeas to the Supreme Court of Appeals of West Virginia, the state court of last resort in this proceeding. Acceptance of appeals is completely discretionary with that Court. This petition was denied on March 25, 1982. A second petition for appeal and supersedeas to the Supreme Court of Appeals of West Virginia was also timely filed and was denied on July 6, 1982.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is Amendment XIV of the Constitution of The United States. The statutory provisions involved are West Virginia Code §11-3-1, certain sections of Chapter 11A, Articles 3 and 4 of the West Virginia Code and W. Va. Code §§31-1-15 and 56(a). Both the constitutional and statutory provisions are included verbatim in the Appendix.

STATEMENT OF THE CASE

The Proceedings Below

Russell Creek Land Company ("Russell Creek"), titleholder to a parcel of commercial property ("Property") located in Huntington, Cabell County, West Virginia, and improved with a fast food restaurant and having a fair market value in excess of $221,000.00, and BBF, Inc., ("BBF"), a lessee of the Property from Russell Creek, commenced this civil action against Charjuan, Inc. ("Charjuan") on May 23, 1979. Charjuan had purportedly acquired title to the Property from the State of West Virginia by payment of $13,000.00 at a tax sale for nonpayment of the 1975 calendar year real estate taxes in the amount of $1,345.78. Russell Creek and BBF seek to have the tax deed from the State of West Virginia to Charjuan set aside as a void deed and to remove the cloud on title to the Property.

The case was heard by the Honorable Dan C. Robinson, Judge of the Circuit Court of Cabell County, for decision upon the stipulations of fact entered into by the parties, and the testimony adduced at an evidentiary hearing conducted on the 21st day of November, 1980. A judgment was awarded by that Court in favor of Charjuan and was entered accordingly on the 6th day of November, 1981. The Court overruled the motion of the petitioners for reconsideration of the final decision of the Court, pursuant to an order entered on the 25th day of January, 1982.

Subsequent to this action, the petitioners timely petitioned the Supreme Court of Appeals of West Virginia for appeal and supersedeas. This petition was denied on March 25, 1982. The petitioners' second timely petition for appeal and supersedeas was also denied by the Supreme Court of Appeals of West Virginia on July 6, 1982.

How Federal Question is Presented

The constitutional issues present in this case were raised by the petitioners' complaint filed in the Circuit Court of Cabell County, West Virginia. That Court held that: "None of the proceedings sought to be overturned by the plaintiffs, Russell Creek Land Company and BBF, Inc., violated the due process of law rights of the plaintiffs, as guaranteed in the Constitution of the State of West

Virginia and the United States" and, therefore, refused to set aside the deed from the State of West Virginia to Charjuan.

The constitutional issues were also raised by way of assignment of error in each of the petitions to the Supreme Court of Appeals of West Virginia, the state court of last resort which has complete discretion in granting and refusing appeals. That Court refused to grant either of the petitions and, therefore, did not hear or pass upon the merits of the case. For this reason, the writ of certiorari requested should be addressed to the Circuit Court of Cabell County, West Virginia.

West Virginia Tax Sale Statutory Scheme

West Virginia real property taxes are assessed on July 1 of each year for the following fiscal calendar tax year and become a lien against the property assessed as of the date assessed. W.Va.Code §§11A-1-2 and 11-3-1. However, the taxes cannot be collected until after July 15th of the calendar year to which they relate. W.Va. Code §11A-1-6.

If the first half of a year's taxes are not paid by October 1 of that year, they become delinquent as of October 1 and, if the second half of such taxes are not paid by April 1 of the following year, they become delinquent as of April 1. W.Va. Code §11A-1-3. Once the taxes are delinquent, the county sheriff must, on or before May 1 of the succeeding year for which the taxes were assessed, prepare and publish a list of real estate delinquent for taxes arranged by district and alphabetically by name of the person charged with the taxes. W.Va. Code §11A-2-11. Such list is to be posted at the front door of the county courthouse and is to be published one time in a local newspaper as a Class I—0 legal advertisement. W.Va. Code §11A-2-13. The sheriff must, on or before September 10 of each year, prepare and publish a second list of delinquent lands. The list is published once a week for three weeks in a local newspaper as a Class III—0 legal advertisement. W.Va. Code §11A-3-2. The list is to contain a notice of sale indicating that the sale is to occur at the front door of the county courthouse and the date and time of the sale. No other notice of the impending sale is afforded the owners of the property and none was given to Russell Creek in the instant case. The sheriff then sells each parcel at a public auction to the highest bidder for cash on any Monday after October 14th and before November 23rd between the hours of 10:00 a.m. and 4:00 p.m. W.Va. Code §11A-3-4.

In the event no one at the sale bids the amount of taxes, interest and charges due on the real property offered for sale, the sheriff purchases the property on behalf of the State. W.Va. Code §11A-3-6. Title to the property vests in the State without a deed subject to the right of redemption of the former owner. W.Va. Code §11A-3-7. At any time within eighteen months after the date of the purchase of the property by the State, the former owner or anyone else entitled to pay the taxes on the property may redeem the property. W.Va. Code §11A-3-8. No notice of the right to redeem is given the former owner or anyone else entitled to redeem the property and no such notice was given the petitioners in this case.

On or after May 1 and on or before October 1 of each year, the auditor must certify to the Circuit Court of each county a list of all lands sold to the State at the previous sheriff's sale. W.Va. Code §11A-4-9. As soon as possible after the receipt of the certified list, the Deputy Commissioner of Forfeited and Delinquent Lands ("Deputy Commissioner")must institute a civil action in the name of the State of West Virginia for the sale for benefit of the school fund of all the lands certified in the list. W.Va. Code §11A-4-10. After institution of the suit by the Deputy Commissioner, a notice must be published as a Class III—0 legal advertisement in a local newspaper stating, inter alia, that the object of the suit is to obtain a decree of the Circuit Court ordering the sale for the benefit of the school fund of all lands included in the suit. W.Va. Code §11A-4-12. The former owner has an opportunity to petition the Court as a privilege of redemption, once the Deputy Commissioner's suit is commenced and before confirmation of the sale of the property. W.Va. Code §11A-4-18. No other notice of the suit, the privilege to petition the Court to redeem or of the impending or actual sale is afforded to the former owner and none was given to Russell Creek in the instant case.

The Court then enters a decree ordering the land to be sold by the Deputy Commissioner at public auction to the highest bidder and fixing the time and place of the sale. W.Va. Code §11A-4-22. At least fifteen days prior to the date of the sale, the Deputy Commissioner must publish a list in a local newspaper of all the lands to be sold as a Class III—0 legal advertisement. W.Va. Code §11A-4-23. The sale must be held on the date fixed by the Court.

No notice, other than the notices by publication referred to above, is afforded the former owners of property in connection with these proceedings by the Deputy Commissioner. None other was afforded

Russell Creek in the instant case.

In the event the sale is confirmed by the Court, the final step in this statutory scheme finds the Deputy Commissioner tendering a deed to the purchaser. W.Va. Code §11A-4-32. This is the manner in which the respondent, Charjuan, Inc., obtained a deed to the property involved in this case.

Facts Relating To The Tax Deed From The State

Russell Creek has had its principal place of business at 16 Belmont Drive, Gallipolis, Ohio 45631, since 1967. The sole income producing asset of the company was the subject Property which is located at 3211 Washington Boulevard in Huntington, West Virginia. Russell Creek had purchased the Property in 1963. Russell Creek was not in possession of the Property at the time of the sheriff's sale in October of 1976 to the State since BBF had leased the Property from Russell Creek. BBF, an Ohio corporation, and its predecessor corporation maintained its principal place of business in Columbus, Ohio. The 1975 real estate taxes on the Property in the amount of $1,345.78 were never paid and the Property became delinquent for taxes in 1976. Neither of the petitioners received notice in 1975 that taxes were due or that the taxes were delinquent.

The Property which had a fair market value in excess of $221,000.00 at or near the time of sale was put up for sale for delinquent taxes at a sheriff's sale in October of 1976. No individual purchased the property, so it was purchased by the sheriff for the State of West Virginia. Notice of the delinquency and of the sheriff's impending sale were published in Huntington, West Virginia, newspapers and posted on the door of the Cabell County, West Virginia, courthouse as required by law. Petitioners, however, had no actual notice and received no form of notice other than constructive notice by publication and posting on the courthouse door that the taxes on the Property were delinquent and that the Property was to be sold for delinquent taxes. Petitioners received no notice whatsoever that the Property had been purchased by the State at the sheriff's sale in October 1976, and that they had a right to redeem the Property within eighteen months after the date of said sale.

On April 3, 1979, the Deputy Commissioner of Forfeited and Delinquent Lands for Cabell County, West Virginia, instituted suit in Cabell County Circuit Court and offered the Property for sale for

nonpayment of taxes to the highest bidder. At the time of this offer, the Property was occupied by Smith-Eckard Corporation which had been assigned BBF's lease. Notice of the suit and sale, as required by law, had been published in the Huntington, West Virginia, newspapers. Charjuan, who was the highest bidder at the Commissioner's sale purchased the Property for the sum of $13,000.00. On April 3, 1979, the sale was confirmed by order of the Circuit Court and a deed was delivered conveying the Property to the respondent. Petitioners had no actual notice and received no form of notice other than constructive notice by publication that the Deputy Commissioner had instituted suit to sell the Property or was offering it for sale. In fact, it wasn't until April 23, 1979,that the President of Russell Creek was first apprised that there was a problem with the taxes and that there had been any type of sale of the Property for taxes.

REASONS FOR GRANTING THE WRIT

1. THE WEST VIRGINIA DELINQUENT TAX SALE SCHEME IN GENERAL, AND AS IT AFFECTS THE PETITIONERS IN PARTICULAR, VIOLATES THE DUE PROCESS CLAUSE CONTAINED IN THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND CONFLICTS WITH THIS COURT'S DECISIONS IN *MULLANE* AND ITS PROGENY BY REQUIRING NOTICE TO A DELINQUENT TAXPAYER PRIOR TO SALE OF ITS PROPERTY ONLY BY NEWSPAPER PUBLICATION AND POSTING ON A COURTHOUSE DOOR.

Under the Fourteenth Amendment to the Constitution of The United States no person shall be deprived of "life, liberty, or property, without due process of law." West Virginia's procedure for selling real estate which is delinquent for nonpayment of taxes deprives owners of their property without such due process.

This Court's decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950), struck the death knell to notice by publication as a panacea for the demands of due process in instances where the affected party's name and address are known or easily ascertainable. In *Mullane*, this Court declared unconstitutional a section of the New York Banking Law which permitted ser-

vice of process by newspaper publication upon the beneficiaries of a common trust fund whose addresses were known or readily available. It had been argued in *Mullane* that such constructive notice was sufficient as the New York proceeding was an "in rem" proceeding. *Mullane* emasculated the distinction between "in rem" and "in personam" proceedings for determining the constitutional sufficiency of notice given. *Mullane* at 339 U.S. 312-313. More importantly to the present case, *Mullane* also enunciated the general principle that notice in all proceedings must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action. . . . " *Mullane* at 339 U.S. 314.

The *Mullane* standard for due process of law has been applied by this Court in subsequent cases involving bare notice by publication. In *Schroeder v. City of New York*, 371 U.S. 208 (1962) and *Walker v. City of Hutchinson*, 352 U.S. 112 (1956), this Court struck down notice by publication in land condemnation proceedings as being violative of constitutional due process. In a railroad reorganization, notice by publication to creditors of the time for filing their claims was held to be constitutionally infirm. *City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293 (1953). In support of its decision, this Court stated that "(n)otice by publication is a poor and sometimes a hopeless substitute for actual service of notice" and difficult to justify. 344 U.S. at 296. *In Covey v. Town of Somers*, 351 U.S. 141 (1956) and *Robinson v. Hanarahan*, 409 U.S. 38 (1972), notices by publication of tax sales were held to be constitutionally insufficient where the landowner in *Covey*, known to be mentally incompetent, was without a guardian and unable to understand the nature of the proceedings and where additional notice in *Robinson* was sent to the individual's home address at a time when he was known to the authorities to be in jail.

Recently, this Court used *Mullane* as its standard in holding that a Kentucky statute which provided for service of process in forcible entry and detainer actions to be made, under certain circumstances, by posting a summons on the door of a tenant's apartment, to be unconstitutional because the tenants were not provided adequate notice of the proceedings against them before the issuance of the final order of eviction. *Greene v. Lindsey*, 102 S.Ct. _____ (1982). If the posting of notice or process upon the door of the affected premises is not such notice as is likely to inform the occupant of the legal proceedings instituted against him, then, surely, notice to a delinquent taxpayer by posting upon the door of a county cour-

thouse is not a likely means of informing the taxpayer that his property is in jeopardy. Moreover, even posting of notice on the affected premises is more likely to reach the owner's or occupant's attention than some obscure legal notice appearing in the back pages of a newspaper along with garage sale advertisements and such.

The general rule which emerges from *Mullane* and its progeny is that notice by publication is constitutionally inadequate with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question. Moreover, "(w)here the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Schroeder*, supra, at pp. 212, 213.

In the present case, there was no compelling or persuasive reason why such direct notice could not have been given. The name and address of Russell Creek, a West Virginia corporation, was readily available through the offices of the West Virginia Secretary of State which is by statute designated as the agent "to accept service of notice and process on behalf of every such corporation. . . ." W. Va. Code §31-1-15. By statute, Russell Creek was required to and did keep its mailing address on record with the Secretary of State. W. Va. Code §31-1-56(a). If notice of the sheriff's sale had merely been sent to the Secretary of State for service on Russell Creek, upon receipt of the notice the Secretary of State would have been obligated to dispatch a copy of it to the corporation's record address via registered or certified mail. W. Va. Code §31-1-15. This was not done in the instant case. Neither was it required by statute.

West Virginia law requires only that delinquent landowners receive notice by publication and by posting upon the county courthouse door before the termination of their property interest. W. Va. Code §§11A-3-2 and 11A-2-13. This lack of compliance with the due process requisites contained in the Constitution of The United States justifies the grant of certiorari to review the lower court's decision.

2. THE WEST VIRGINIA DELINQUENT REAL ESTATE TAX SALE SCHEME IN GENERAL, AND AS IT AFFECTS THE PETITIONERS IN PARTICULAR, VIOLATES THE DUE PROCESS CLAUSE OF THE CONSTITUTION OF THE

UNITED STATES AND CONFLICTS WITH THIS COURT'S DECISIONS IN *MULLANE* AND ITS PROGENY BY DEPRIVING TAXPAYERS OF A STATUTORY ENTITLEMENT WITHOUT NOTICE OF SUCH DEPRIVATION.

The failure to provide notice to a former landowner of his right to redeem his property when the State purchases the property at a sheriff's sale deprives the former owner of a statutory entitlement. The Fourteenth Amendment's due process protection of property extends to any significant property interest, including a statutory entitlement. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Once the State has created a right, it may not authorize the deprivation of that right without minimum procedural safeguards as required by the due process clause to insure that the state-created right is not arbitrarily abrogated. In *Dow v. State of Michigan*, 396 Mich. 192, 240 N.W. 2d 450 (1976), the Court stated in footnote number 21 that: "Even if the right to redeem were not constitutionally rooted, once granted by statute it is protected by the Due Process Clause." 240 N.W. 2d at 457.

In *Arnett v. Kennedy*, 416 U.S. 134 (1974), this Court recognized that the right to procedural due process "is conferred not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriated procedural safeguards." *Arnett* at 416 U.S. 166-167. In *Wolf v. McDonnell*, 418 U.S. 539, 557-558 (1974), this Court recognized that the state was not compelled to give prisoners credit for good time:

> "But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state created right is not arbitrarily abrogated.... [A] person's liberty is equally protected, even when the liberty itself is a statutory creation of the

State. The touchstone of due process is protection of the individual against arbitrary action of the government."

In West Virginia, the state has created two opportunities for a former owner to redeem property sold at a tax sale. W. Va. Code §11A-3-8 grants a former owner of delinquent land the "right" to redeem at any time within eighteen months after the date of the purchase by the State at the sheriff's sale. W. Va. Code §11A-4-18 grants a former owner of delinquent land an opportunity to apply at any time before confirmation of the Deputy Commissioner's sale for permission to redeem the interest formerly owned by him. The method of redemption granted in W. Va. Code §11A-3-8 is a right, a statutory entitlement. The method in W. Va. Code §11A-4-18 is a privilege. *Pearson v. Dodd*, 221 S.E. 2d 171, 182-183 (W.Va., 1975).

The West Virginia Court recognizes the principle that, once a State has created a right, it may not authorize the deprivation of that right without the minimum procedural safeguards required by the due process clause. In *Pearson*, supra, the redemptive right granted by W. Va. Code §11A-3-8 was held to be a statutory entitlement. *Pearson* at 221 S.E. 2d 174. And, the due process guarantees of the West Virginia and Federal constitutions extend protection to any significant property interest, including statutory entitlements. *Pearson* at 221 S.E. 2d at 181. More recently the West Virginia Court held that a landowner, whose property is to be sold for delinquent taxes under Chapter 11A, Article 3 of the West Virginia Court Code, is an interested party, by virtue of the statutory entitlement to redeem delinquent property contained in Article 3, who must be afforded the protection of the due process guarantees contained in the West Virginia and United States Constitutions. *Don S. Company, Incorporated v. Donald D. Roach, et al.*, 286 S.E. 2d 491 (W.Va., 1981).

In the present case, the petitioners had significant and substantial property interests entitled to protection by the due process clauses of both the West Virginia and United States Constitutions. However, neither petitioner was given notice of its right to redeem the Property subsequent to the sheriff's sale, nor were they given notice of the privilege to redeem the Property prior to the Deputy Commissioner's sale.

The State of West Virginia should not be allowed to deprive the petitioners of their significant and substantial property interests ab-

sent the Constitutional requisites of notice "reasonably calculated, under all the circumstances," to apprise them of the tax foreclosure proceedings, and the opportunity to be heard prior to the termination of those interests. However, Chapter 11A, Article 3 of the West Virginia Code does exactly that by not providing for the giving of notice to property owners of their right of redemption.

Since the right to redeem property is granted by the provisions of West Virginia Code §11A-3-8 and is a statutory entitlement protected by the due process clause, this right of redemption should not be abrogated absent the minimum procedural safeguards required by that clause. The petitioners' property interests were terminated absent those procedural safeguards and that justifies the grant of certiorari to review the lower court's decision.

3. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS REGARDING THE REQUISITES OF DUE PROCESS AS APPLIED TO NOTICE TO OWNERS OF PROPERTY IN DELINQUENT TAX SALE PROCEEDINGS.

Several state courts, citing the *Mullane* due process standards, have recently held that newspaper publication of real estate tax delinquency and sale notices is not constitutionally adequate notice with respect to a person whose name and address are known or easily ascertainable. *In re Foreclosure of Liens for Deliquent Taxes*, 62 Ohio St. 2d 333, 405 N.E. 2d 1030 (1980); *Township of Montville v. Block 69, Lot 10*, ____ N.J. ____, 376 A. 2d 911 (1977); *Henderson County v. Osteen*, ____ N.C. ____, 235 S.E. 2d 166 (1977); *Dow v. State of Michigan*, 396 Mich. 192, 240 N.W. 2d 450 (1976); *Chapin v. Aylward*, 204 Kan. 448, 464 P. 2d 177 (1970); *Pierce v. Board of County Commissioners of Leavenworth County*, 200 Kan. 74, 434 P. 2d 858 (1967); *Laz v. Southwestern Land Company*, 97 Ariz. 69, 397 P. 2d 52 (1964). All of these cases emanate from a statutory notice by publication scheme essentially identical to that utilized in West Virginia.

In *Dow v. State of Michigan*, supra, the court held that the Due Process Clause requires that an owner of a significant property interest be given proper notice and an opportunity for a hearing at which he or she may contest the state's claim that it may take the property for nonpayment of taxes. The *Dow* court stated that newspaper publication is not constitutionally adequate notice of

such right and, following the logic of *Mullane*, reasoned that few people would learn of the pendency of a tax foreclosure proceeding as a result of newspaper publication. Therefore, the *Dow* court adopted the *Mullane* doctrine that newspaper publication is not "notice reasonably calculated, under all the circumstances" to apprise delinquent taxpayers of the pendency of a tax foreclosure proceeding. Since publication provides most taxpayer with no notice at all, the state denies the delinquent taxpayer an opportunity for a hearing at which the state's right to foreclose can be contested. *In re Foreclosure of Liens for Delinquent Taxes*, supra; *Township of Montville v. Block 69, Lot 10*, supra; *Henderson County v. Osteen*, supra; *Dow v. State of Michigan*, supra; *Chapin v. Aylward*, supra; *Pierce v. Board of County Commissioners of Leavenworth County*, supra; *Laz v. Southwestern Land Corp.*, supra.

In *Township of Montville v. Block 69, Lot 10*, supra, the New Jersey Supreme Court, in regard to a former property owner's right to redeem property, held "under both the state and federal Constitutional guarantees, that where an owner's name and address appear on the municipality's tax rolls, notice must be sent by mail before a taxpayer's right to redeem property may be foreclosed." 376 A. 2d at 918.

The court below has held that newspaper publication of real estate tax delinquency and sale notices is constitutionally firm and this conflict with other state court decisions justifies the grant of certiorari to review the decision below.

4. THE WEST VIRGINIA DELINQUENT REAL ESTATE TAX SALE SCHEME RAISES SIGNIFICANT AND RECURRING QUESTIONS REGARDING THE STANDARD OF DUE PROCESS PROTECTION WHICH OUGHT TO BE AFFORDED BY WAY OF NOTICE TO PROPERTY OWNERS THAT THEIR PROPERTY IS IN JEOPARDY.

The previously cited cases should adequately illustrate the frequency with which the question of delinquent tax foreclosure sale notices as measured by due process standards arise and emphasize the need for guidance and uniformity as to the proper standards to be applied to such notices.

In fact, this Court previously accepted this very question out of West Virginia for review in *Pearson v. Dodd*, 429 U.S 396 (1977).

However, upon argument of that case this Court decided that, since the petitioner did not challenge the adequacy of the notice attendant to the sheriff's sale of property to the state, a federal question was not properly presented and, consequently, the appeal was dismissed. In referring to the sheriff's sale as "the 1962 sale" and the later (after the right of redemption of the property had expired) Deputy Commissioner's sale as "the 1966 sale," Your Honors explained:

> "The jurisdictional statement phrased the due process question presented by the appeal as whether notice by publication of the tax sale was constitutionally deficient, but was unclear whether the challenge was directed to the 1962 sale to the State or to the 1966 sale to Appellee Dodd. At oral argument, counsel for appellant made clear, however, that the challenge was not addressed to the procedures for notice attending the 1962 transfer of the interest to the State (citation omitted), but solely to the procedures for notice attending the 1966 sale of the interest by the State to Appellee Dodd. Indeed, we were repeatedly informed that the 1962 sale to the State was 'not even an issue in this case.'" 429 U.S. at 397.

Now, the case presented by this petition returns to Your Honors in proper form, hopefully, the question which you apparently would have decided in *Pearson* had the federal question been presented properly there.

CONCLUSION

The West Virginia delinquent tax sale procedure contained in Chapter 11A, Article 3 of the West Virginia Code fails to adhere to the federal constitutional requisites of due process of law in two instances. First, constructive notice to a delinquent taxpayer of an impending tax sale solely through the posting of a delinquency list on the county courthouse door and the publication of the list in local newspapers prior to the county sheriff's sale of the affected property fails to provide required minimal due process notice. Second, the West Virginia statutory scheme contained in Chapter 11A, Article 3 of the West Virginia Code is constitutionally infirm in that it affords

no notice to a tax delinquent landowner of the right to redeem the affected property subsequent to the sheriff's sale.

Aside from the injustice suffered by the petitioners as the result of the deprivation of their property through the lack of due process here, the questions presented by this petition have much broader significance to other taxpayers and in resolving conflicting decisions and providing guidance for uniformity of due process procedures among the states.

For these reasons, it is respectfully submitted that the requested Writ should issue and the case be heard in full.

Respectfully submitted,

BERT M. GRIMM, JR.

Wood, Grimm & Delp
Penthouse Suites
The Frederick Building
Fourth Avenue at Tenth Street
Huntington, West Virginia 25701
Phone: (304) 529-0333

October 4, 1982

COUNSEL FOR PETITIONERS

APPENDIX

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IN THE CIRCUIT COURT OF CABELL COUNTY,
WEST VIRGINIA

RUSSELL CREEK LAND COMPANY,
a West Virginia corporation,
and BBF, INC., an Ohio
corportation,
Plaintiffs,

Vs. CIVIL ACTION NO. 79-1431

CHARJUAN, INC., a West
Virginia corporation,
Defendant,

and

CHARJUAN, INC., a West
Virginia corporation,
Plaintiff,

Vs. MAGISTRATE COURT NO. 80-C-1809
CIVIL ACTION NO. 80-2416

SMITH - ECKARD CORPORATION
d/b/a BURGER CHEF (3211
Washington Boulevard,
Huntington, West Virginia),
Defendant.

ORDER

This matter having come on for trial to the Court on the 21 day of November, 1980, before the Honorable Dan C. Robinson. The Court, after receiving the Stipulation of Facts, which is hereby ORDERED filed, and after considering same, as well as the evidence by both depositions and by oral testimony to the Court, and the documentary and demonstrative evidence and the arguments of counsel, is of the opinion to make the following Findings of Fact and Conclusions of Law and to issue the following decree.

Findings of Fact

1. Plaintiff, Russell Creek Land Company, is a West Virginia corporation, with its principal place of business located at 16 Belmont Drive, Gallipolis, Ohio 45631. The mailing address for Russell Creek Land Company is Post Office Box 327, Gallipolis, Ohio 45631.

Plaintiff BBF, Inc., is an Ohio corporation, with its principal place of business located at 180 East Broad Street, Columbus, Ohio 43215.

Defendant, Charjuan, Inc., is a West Virginia corporation, with its principal place of business located at 717 Fifth Avenue, Huntington, West Virginia 25701.

2. Crown Insurance Company, a corporation, conveyed fee simple title to the real property which is in issue in this case to the plaintiff, Russell Creek Land Company, by deed dated August 19, 1963, which deed is of record in the office of the Clerk of the County Commission of Cabell County, West Virginia, in Deed Book No. 609, commencing at Page No. 91 (hereinafter referred to as "the subject property").

3. By an agreement of lease dated August 1, 1963, Russell Creek Land Company leased all or part of the subject property to BBHE, Inc., a predecessor to BBF, Inc., by merger into BBF, Inc., which lease is of record in the aforesaid Clerk's office in Bonds, Contracts and Leases Book No. 197, commencing on Page No. 650.

4. Commencing with the 1965 calendar tax year through the 1974 calendar tax year, the Cabell County, West Virginia, ad valorem real estate taxes on the subject property were assessd by the Cabell County Assessor in the name of "Russell Creek Land Co.," the subject property was listed and entered on the land books of Cabell County, West Virginia, and was described on the tax tickets and tax statements which were prepared by the Cabell County Sheriff from the Cabell County Assessor's records as follows:

D—E—F—G—H—I—J—K—L—M—Y &
Pt Lts N—O—P—Q—R & Par Arlington

5. "Tax tickets" are prepared with information furnished by the office of the Cabell County Assessor. "Tax tickets" are maintained on file in the office of the Cabell County Sheriff and are not mailed to tax payers.

"Tax statements" are prepared by the Cabell County Sheriff. "Tax statements" are mailed to an address as indicated on a card system maintained by the Cabell County Sheriff. Beginning with calendar tax year 1975, a computer printout mailing list is maintained showing the addresses to which "tax statements" are mailed. This information is a compilation of the data maintained in the card system. The Sheriff has no statutory duty to maintain an address system, or to prepare and mail the "tax statements." The "tax statement" contains the same information as the "tax tickets." Copies of the "tax statements" are not retained by the Cabell County Sheriff.

6. On July 1, 1974, the Cabell County, West Virginia ad valorem real estate taxes for the 1975 calendar tax year on the subject property in the amount of $1,345.78 were assessed by the Cabell County Assessor in the name of "Russell Creek Land Co;" the subject property was listed and described on the Land books of Cabell County, West Virginia, and was described on the"Tax statement" and "tax tickets" which were prepared by the Cabell County Sheriff from the Cabell County Assessor's records as follows:

LTD—MINC & Y & PTLTN—RINC & PAR SALTWELL RD & RT 60

7. Real estate the subject of this suit was listed on the land books of Cabell County, West Virginia, and assessed therein in the name of the Russell Creek Land Co. for the years 1965 through 1976, inclusive.

8. Total real estate taxes for fiscal years 1973 and 1974 on the subject property were $2,765.14 (1973 being delinquent) and were paid on September 17, 1974, by BBF, Inc., 1840 McKenzie Drive, Columbus, Ohio. On or about November 25,1974, the Cabell County Sheriff mailed a check in refund of an overpayment of these 1973 and 1974 taxes to BBF, Inc., 1840 McKenzie Drive, Columbus, Ohio, which check was received by the said BBF, Inc.

9. At some time between July 15 and August 1, 1975, the Cabell County Sheriff mailed the "tax statement" on the subject property for the 1975 calendar tax year to BBHE, Inc., 619 Harrisburg Pike, Columbus, Ohio, a predecessor in title to BBF, Inc.

10. Neither a copy of the "tax statement" with respect to the subject property for the 1975 calendar tax year, nor any other notice of any nature with respect to the real estate taxes on the subject property for the 1975 tax year was mailed, sent or otherwise delivered to Russell Creek Land Company. Russell Creek never requested one to be sent to it. There was no statutory duty on the Sheriff to send any such notice.

11. The real estate taxes on the subject property for the 1975 calendar tax year were never paid, and the subject property became delinquent for taxes on May 1, 1976.

12. On May 15, 1976, the Cabell County Sheriff, pursaunt to West Virginia Code §11A-2-11, prepared a list of real estate delinquent for taxes for the 1975 calendar tax year, which list included the description for the subject property.

13. On June 25, 1976, the list of real estate delinquent for taxes which included the description of the subject property was caused to be published by the Cabell County Sheriff pursuant to West Virginia Code §11A-2-18 as Class I-O legal advertisement in the two Huntington, West Virginia, newspapers, The Herald-Dispatch, the morning newspaper, and The Huntington Advertiser, the evening newspaper.

14. On September 22, 1976, the Cabell County Sheriff, pursuant to West Virginia Code §11A-3-2, prepared a second list of real estate delinquent for taxes for the 1975 calendar tax year, which list included the description for the subject property.

15. On September 30, October 7 and October 14, 1976, the Cabell County Sheriff, pursuant to West Virginia Code §11A-3-2, caused to be published in the two Huntington, West Virginia newspapers, The Herald-Dispatch, the morning newspaper, and The Huntington Advertiser, the evening newspaper, the second list of real estate delinquent for non-payment of taxes for 1975 which included the subject property, as a Class III-O legal advertisement.

16. On October 18, 1976, the Cabell County Sheriff conducted a sale of Cabell County various lands delinquent for taxes for the 1975 calendar tax year,which included the subject property. This sale was conducted in the hallway on the first floor of the Cabell County Courthouse in front of the Cabell County Sheriff's office, inside the Eighth Street door of the Courthouse, approximately twelve to fifteen feet from said door. In 1976 there were three main entrance doors to the Cabell County Courthouse, the Fifth Avenue door on the south, the Fourth Avenue door on the north, and the Eighth Street door on the east.

17. No notice of the tax sale of October 18, 1976, was mailed to Russell Creek Land Company or to BBF, Inc., there being no statutory duty so to do.

18. At the Sheriff's sale described in paragraph 15, above, the Cabell County Sheriff purchased the subject property on behalf of the State of West Virginia for the amount of the taxes, interest and charges due on said real estate, $1,345.78, pursuant to Article 3, Chapter 11A of the West Virginia Code.

19. Neither Russell Creek Land Company, nor BBF, Inc., were given notice of the right of redemption of the subject property from the State of West Virginia by the State of West Virginia, there being no statutory duty so to do.

20. On September 30, 1978, pursuant to statute, Glen B. Gainer, Jr., the West Virginia State Auditor, certified to the Circuit Court of Cabell County, West Virginia, the subject real estate to be sold for the benefit of the school fund, by the Cabell County Deputy Commissioner of Forfeited and Delinquent Lands.

21. On January 5, 1979, Nye King, Deputy Commissioner of

Forfeited and Delinquent Lands, filed suit against several defendants including Russell Creek Land Company, in Civil Action No. 79-50, Circuit Court of Cabell County, West Virginia, to sell at public sale certain lands delinquent for taxes for year 1975. This included the subject real property.

22. On January 9, 16 and 23, 1979, Nye King, Deputy Commissioner of Forfeited and Delinquent Land caused to be published a notice of order of publication which included the said Russell Creek Land Company as defendant, pursuant to West Virginia Code Ann. §11A-4-12 as a Class III-O legal advertisement in the two Huntington, West Virginia, newspapers, The Herald-Dispatch, the morning newspaper, and The Huntington Advertiser, the evening newspaper.

23. Other than for the newspaper publication, no other process was served upon Russell Creek Land Company or BBF, Inc., there being no statutory or procedural duty so to do.

24. Under West Virginia law, February 15, 1979, was the last day on which an Answer could be filed to the Complaint in Civil Action No. 79-50. No Answer to the Complaint was filed by Russell Creek Land Company or BBF, Inc. On February 23, 1979, Judge David B. Daugherty entered an Order of Default against the defendants named in Civil Action No. 79-50, and ordered sale of the property listed in the Affidavit of Nye King, Deputy Commissioner, including the subject property, after publication of a Notice of Sale.

25. On February 27, March 6 and March 13,1979, Notice of Sale of the properties which included the subject property was published by Nye King, Deputy Commissioner, pursuant to West Virginia Code Ann. §11A-4-23 was a Class III-O legal advertisement in the two Huntington, West Virginia newspapers, The Herald-Dispatch, the morning newspaper, and The Huntington Advertiser, the evening newspaper. Sale was to be held on April 3, 1979, at the East Front Door of the Cabell County Courthouse.

26. Neither Russell Creek Land Company, nor BBF, Inc., were given notice of the privilege of redemption of the subject property from the State of West Virginia by the State of West Virginia, there being no statutory duty so to do.

27. The subject real estate was sold at a public auction conducted on April 3, 1979, at the time according to the Notice of Sale. During the auction, the Deputy Commissioner stood outside the East Front door of the Cabell County Courthouse, approximately 20 feet from the Eighth Street door near the bottom of the steps. The bidders were standing at the top of the steps.

28. The subject property was sold to Charjuan, Inc., a West Virginia corporation, for $13,000.00, (the top bid) by Nye King, Deputy Commissioner of Forfeited and Delinquent Lands, after several bids, and that while discrepancy exists between the purchase price and the actual value of the property, the consideration paid was not of minimal nature and constituted substantial consideration, for the said property and was aproximately nine times the taxes due on said property, and was fair and as high as might reasonably be expected, the market value of the subject property being in excess of $221,000.00.

29. On April 3, 1979, an Order confirming the sale of the subject property was entered by Judge Alfred E. Ferguson, Judge of the Circuit Court of Cabell County, West Virginia.

30. On April 16, 1979, a deed dated April 13,1979, from Nye King, Deputy Commissioner, to Charjuan, Inc., was delivered in return for $13,000.00 and was recorded in Deed Book 799, at page 102, Office of the Clerk of the Cabell County Commission.

31. On April 16, 1979, a Report of Sale was filed by Nye King, Deputy Commissioner, with the Clerk of the Circuit Court of Cabell County, West Virginia.

32. All issues charging any impropriety on behalf of or by Charles Clark were withdrawn by the plaintiffs as not being issues to be resolved by the Court and the Court finds that there is, in fact, no factual or legal basis for such issues.

33. The tax sale of the subject property by the Cabell County Sheriff to the State of West Virginia for delinquent taxes was valid and proper.

34. Adequate and proper notice of the tax foreclosure pro-

ceedings and tax sale were given to Russell Creek Land Company and BBF, Inc., under the laws of the State of West Virginia.

35. No notice of the right of redemption of the subject property was given to Russell Creek Land Company and BBF, Inc., under the laws of the State of West Virginia, there being no legal duty so to do.

36. No notice of the privilege of redemption was given to Russell Creek Land Company and BBF, Inc., under the laws of the State of West Virginia, there being no legal duty so to do.

37. Russell Creek Land Company and BBF, Inc., failed to request any hearing, or file any papers or seek litigation of the State's right to foreclose on the subject property and to cure the default prior to judgment and sale by the Deputy Commissioner.

38. The assessment of the subject property was valid and proper and was not defective and the said Russell Creek Land Company and BBF, Inc., had notice of the delinquent taxes for 1975.

39. The description of the subject property was not defective in the first notice of delinquency and the notice of sale both caused to be published by the Cabell County Sheriff in the newspapers as aforesaid.

40. The list of delinquent lands which was published by the Cabell County Sheriff on the subject property during the time period herein contemplated substantially complied with the laws of the State of West Virginia and no prejudice resulted to any of the parties hereto.

41. The sale of the subject property by Nye King, Deputy Commissioner of Delinquent and Forfeited Lands to Charjuan, Inc., was valid and proper, and at the East Front Door of the Cabell County Courthouse.

42. The Court proceedings which resulted in the sale of the property to Charjuan, Inc., by Nye King, Deputy Commissioner of Delinquent and Forfeited Lands, pursuant to the civil action filed by Nye King, Deputy Commissioner of Delinquent and Forfeited Lands

was regular and orderly and the said sale was proper under the laws of the State of West Virginia.

43. The description of the subject property in the notice of sale published by the Deputy Commissioner of Delinquent and Forfeited Lands was not defective.

44. The State of West Virginia had valid and legal title to the subject property under the laws of the State of West Virginia.

45. None of the proceedings sought to be overturned by the plaintiffs, Russell Creek Land Company and BBF, Inc., violated the due process of law rights of the plaintiffs, as guaranteed in the Constitution of the State of West Virginia and the United States.

46. Charjuan, Inc., is the true, valid, proper and legal holder and owner of the subject property.

47. The Magistrate Court case, civil action No. 80-2416, which was consolidated herein on motion of the plaintiffs put the title of the real estate in dispute and the Magistrate Court therefore, lacked subject matter jurisdiction and said case should be dismissed.

Conclusions of Law

1. Charjuan, Inc., is the true, lawful, valid and proper owner of the subject real property against Russell Creek Land Company and BBF, Inc.

2. The Deed from the Deputy Commissioner of Delinquent and Forfeited Lands is an apt, valid and proper Deed under the laws of the State of West Virginia and that said Deed granted to Charjuan, Inc., lawful and peaceful title to and possession of the subject real property.

(Note from the Court: The Court repeatally suggested to the defendant that it amend its answer to include a claim for rentals on the subject property, which was not so done by defendant.)

It is hereby ADJUDGED, ORDERED and DECREED that the Complaint of the plaintiffs be and the same hereby is dismissed with prejudice and the defendants Complaint in the Magistrate Court

case heretofore consolidated on plaintiff's motion, be and the same hereby is dismissed with prejudice.

To all of which the plaintiffs object and except.

It is further ADJUDGE, ORDERED and DECREED that the plaintiffs be and the same hereby are granted a sixty (60) day stay of execution in order to perfect their appeal to the West Virginia Supreme Court of Appeals.

ENTER:

/s/ Dan C. Robinson
JUDGE

Approved By:

/s/ James Allan Colburn
James Allan Colburn

As to Form Only:

/s/ Bert M. Grimm, Jr.
Bert M. Grimm, Jr.

/s/ Wesley F. Agee
Wesley F. Agee

ENTERED, Circuit Court Div.1..
Order Book No. 55
Page 291 this 6th day
of November 19 81

APPEALS AND WRITS OF ERROR GRANTED continued:

Dana Lee Heck (Cales), Planitiff Below, Aplt. v. James Wayne Heck, Defendant Below, Aple. (Justice Neely would refuse). (No. 15631) (6 July) Randolph

In Re: Robert M. Yoho. (Justices Neely & McHugh would refuse.) (No. 15632) (6 July) Wetzel

Robert Lee Collins, Plaintiff Below, Aple. v. Ada L. Collins, Defendant Below, Aplt. (No. 15633) (6 July) Tucker

Frank T. Hare, Robert A. Hare, & William Hare Sons Co., a corporation, on behalf of themselves and all persons similarly situated, Petitioners Below, Aplts. v. The City of Wheeling a municipal corp., Respondent Below, Aple. (No. 15635) (7 July) Ohio

State of WV, Plaintiff Below, Aple. v. Henry Bias, Defendant Below, Aplt. (No. 15636) (7 July) Logan

James C. Longwell & Peggy J. Stevens, Petitioners Below, Aplts., v. John H. Hodge, Robert Hall, Glenn Morrison, Doug Cornelius and Joffre Rolland, members of the Bridgeport Board of Zoning Appeals, Respondents Below, Aples. (Chief Justice Miller and Justice McGraw would refuse.) (No. 15637) (7 July) Harrison

Howard F. Sigmon, Aplt. v. State Workmen's Compensation Commissioner & Eastern

Associated Coal Corporation Aple.
(No. 15638) (7 July)

APPEALS AND WRITS OF ERROR DENIED:

State of WV v. James Hall. (30 June) — Nicholas

Doris Turnley, Widow of Arthur P. Turnley v. State Workmen's Compensation Commissioner and Monongahela Power Co. (Justice Neely would grant). (6 July)

Clendenin Lumber & Supply Co., Inc., a corp. v. Robert L. Carpenter. (6 July) — Roane

Ohio Valley Contractors, Inc. v. Mountain State Mack, Inc. (6 July) — Wood

Russell Creek Land Co., etc., et al. v. Chajuan, Inc., etc. (Justice Harshbarger would grant.) (6 July) — Cabell

Fred Carter v. Donald Taylor. (Justices Harshbarger & McGraw would grant.) (6 July) — Fayette

Carl R. Bennett, et al., v. Mabel Boggs. (6 July) — Upshur

Cecil Arnold v. James Runyon. (Chief Justice Miller would grant.) (6 July) — Logan

State of WV v. Sharon Keys, aka Candy. (6 July) — Upshur

Jerry Galien v. WV Department of Health. (6 July)

Barbara R. Jason, now Barbara R. Urbassik v. Daniel N. Jason. (Chief Justice Miller & Justice McGraw would grant.) (6 July) — Berdeley

Christopher D. Hanley v. Tammy Jean Hanley. (6 July) — Pocahontas

State of WV v. Lucky Freedie Donald Martin. (6 July) Summers

Marsha C. Moore v. R. Sue Hollandsworth, Magistrate, etc. (6 July)

State of WV v. Danny Lehman. (6 July) Nicholas

Thomas C. Wilburn v. State Workmen's Compensation Commissioner & Rich Creek Mining Co., Inc. (6 July)

CONSTITUTION OF THE UNITED STATES:

[AMENDMENT XIV]

Section 1.

[*Citizenship Rights Not to Be Abridged by States*]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WEST VIRGINIA STATUTES:

§ 11-3-1. Time and basis of assessments; true and actual value; reassessment; special assessors.

All property shall be assessed annually as of the first day of July at its true and actual value; that is to say, at the price for which such property would sell if voluntarily offered for sale by the owner thereof, upon such terms as such property, the value of which is sought to be ascertained, is usually sold, and not the price which might be realized if such property were sold at a forced sale, except that the true and actual value of all property owned, used and occupied by the owner thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona fide tenants shall be arrived at by giving primary, but not exclusive, consideration to the fair and reasonable amount of income which the same might be expected to earn, under normal conditions in the locality wherein situated, if rented. The taxes upon all property shall be paid by those who are the owners thereof on that day, whether it be assessed to them or others. If at any time after the beginning of the assessment year, it be ascertained by the tax commissioner that the assessor, or any of his deputies, is not complying with this provision or that he has failed, neglected or refused, or is failing, neglecting or refusing after five day's notice to list and assess

all property therein at its true and actual value, the tax commissioner may order and direct a reassessment of any of all of the property in any county, district or municipality, where any assessor, or deputy, fails, neglects or refuses to assess the property in the manner herein provided. And, for the purpose of making such assessment and correction of values, the tax commissioner may appoint one or more special assessors, as necessity may require, to make such assessment in any such county, and any such special assessor or assessors, as the case may be, shall have all the power and authority now vested by law in assessors, and the work of such special assessor or assessors shall be accepted and treated for all purposes by the county boards of review and equalization and the levying bodies, subject to any revisions of value on appeal, as the true and lawful assessment of that year as to all property valued by him or them. The tax commissioner shall, with the approval of the board of public works, fix the compensation of all such special assessors as may be designated by him, which, together with their actual expenses, shall be paid out of the county fund by the county court of the county in which any such assessment is ordered, upon the receipt of a certificate of the tax commissioner filed with the clerk of the court showing the amounts due and to whom payable, after such expenses have been audited by the county court.

Any assessor who knowingly fails, neglects or refuses to assess all the property of his county, as herein provided, shall be guilty of malfeasance in office, and, upon conviction thereof, shall be fined not less than one hundred nor more than five hundred dollars, or imprisoned in the county jail not less than three nor more than six months, or both, in the discretion of the court, and upon conviction, shall be removed from office. (1863, c. 118, §§ 63, 64; Code 1868, c. 29, §§ 39, 54,55; 1875, c. 54, §§ 39, 54, 55; 1879, c. 73, §§ 39, 54, 55; 1881 c. 12, §§ 39, 54, 55; 1904, c. 4, § 12; 1905, c. 35, § 12; 1907, c. 80, § 12; 1911, c. 64; 1919, c. 27, § 12; 1921, c. 152, § 12; Code 1923, c. 29, § 12; 1933, c. 40; 1959, c. 155; 1961, c. 142.)

§ 11A-1-2. Lien for real property taxes.

There shall be a lien on all real property for the taxes assessed thereon, and for the interest and other charges upon such taxes, at the rate and for the period provided by law, which lien shall attach

on the first day of July, one thousand nine hundred sixty-one, and each July first thereafter for the taxes payable for the ensuing fiscal year. (1941, c. 117; 1959, c. 155; 1961, c. 142.)

§ 11A-1-3. Accrual; time for payment; interest on delinquent taxes.

All current taxes assessed on real and personal property may be paid in two installments. The first installment shall be payable on September first of the year for which the assessment is made, and shall become delinquent on October first; the second installment shall be payable on the first day of the following March and shall become delinquent on April first. Taxes paid on or before the date when they are payable including both first and second installment, shall be subject to a discount of two and one-half percent. If taxes are not paid on or before the date on which they become delinquent, including both first and second installments, interest at the rate of nine percent per annum shall be added from the date they become delinquent until paid. (1941,c.117; 1961, c. 142.)

§ 11A-1-6. When collection to commence.

The sheriff shall commence collection of current taxes on the fifteenth day of July, or as soon thereafter as he receives copies of the land and personal property books. (1941, c. 117; 1961, c. 142.)

§ 11A-2-11. Delinquent lists; oath.

The sheriff, after ascertaining which of the taxes assessed in his county are delinquent, shall, on or before the first day of May next succeeding the year for which the taxes were assessed, prepare the following delinquent lists, arranged by districts and alphabetically by name of the person charged, and showing in respect to each the amount of taxes remaining delinquent on April thirtieth: (1) A list of property in the land book improperly entered or not ascertainable. (2) A list of other delinquent real estate. (3) A list of all other delinquent taxes.

The sheriff on returning each list shall, at the foot thereof,

subscribe an oath, which shall be subscribed before and certified by some person duly authorized to administer oaths, in form or effect as follows:

I, ..., sheriff (or deputy sheriff or collector) of the County of ....., do swear that the foregoing list is, to the best of my knowledge and belief, complet and accurate, and that I have received none of the taxes listed therein.

Except for the oath, the tax commissioner shall prescribe the form of the delinquent lists. (1941, c.117; 1961, c.142.)

§ 11-A-2-13. Publication and posting of delinquent tax lists.

A copy of each of the delinquent lists shall be posted at the front door of the courthouse of the county at least two weeks before the session of the county court at which they are to be presented for examination. At the same time a copy of each list shall be published as a Class I-0 legal advertisement in compliance with the provisions of article three [§ 59-3-1 et seq.], chapter fifty-nine of this Code, and the publication area for such publication shall be the county. Only the aggregate amount of the taxes owed by each person need be published. To cover the costs of preparing, publishing and posting the delinquent lists, a charge of two dollars and fifty cents shall be added to the taxes and interest already due on each item listed.

Any person, whose taxes were delinquent on May first, may have his name removed from the delinquent lists prior to the time the same is delivered to the newspapers for publication, by paying to the sheriff the full amount of the taxes and costs owed by such person at the date of such redemption. The sheriff shall collect a charge of only fifty cents if redemption is made before the list is delivered for publication. Costs collected by the sheriff hereunder which are not expended for publication shall be paid into the general county fund. (1941, c. 117; 1943, c. 84; 1961, c. 142; 1967, c. 105)

§ 11A-3-2. Second publication of list of delinquent real estate; notice.

On or before September tenth of each year, the sheriff shall prepare a second list of delinquent lands, which shall include all real estate in his county remaining delinquent as of September first, together with a notice of sale, in form or effect as follows:

Notice is hereby given that the following described tracts or lots of land or undivided interests therein in the County of ..... which are delinquent for the nonpayment of taxes for the year (or years) 19...., will be offered for sale by the undersigned sheriff (or collector) at public auction at the front door of the courthouse of the county, between the hours of ten in the morning and four in the afternoon, on the ..... day of....., 19.....

Each unredeemed tract or lot, or each unredeemed part thereof or undivided interest therein, will be sold at public auction to the highest bidder for cash in an amount which shall not be less than the taxes, interest and charges which shall be due thereon to the date of sale, as set forth in the following table:

Name of person charged with taxes	Quantity of land	Local description	Total amount of taxes, interest and charges due to date of sale

Any of the aforesaid tracts or lots, or part thereof or an undivided interest therein, may be redeemed by the payment to the undersigned sheriff (or collector) before sale, of the total amount of taxes, interest and charges due thereon up to the date of redemption.

Given under my hand this ..... day of ....., 19.....

.....
Sheriff (or collector)

The sheriff shall publish the list and notice prior to the sale date fixed in the notice as a Class III-0 legal advertisement in compliance with the provisions of article three [§ 59-3-1 et seq.], chapter fifty-nine of this Code, and the publication area for such publication shall be the county.

To cover the costs of preparing and publishing the delinquent list, a charge of three dollars and fifty cents shall be added to the taxes, interest and charges already due on each itme listed. The sum of the taxes, interest to the date of sale, and other charges shall be stated in the list as the total amount due.

Any person, whose taxes were delinquent on September first, may have his name removed from the delinquent list prior to the

time the same is delivered to the newspapers for publication by paying to the sheiff the full amount of taxes and cots owed by such person at the date of such redemption. In such case, the sheriff shall include but fifty cents of the costs provided in this section in making such redemption. Costs collected by the sheriff hereunder which are not expended for publication shall be paid into the general county fund. (1941, c. 117; 1943, c. 84; 1959, c. 173; 1961, c. 142; 1965, c. 160; 1967, c. 105.)

§ 11A-3-4. Sale by sheriff.

Each unredeemed tract or lot, or each unredeemed part thereof or undivided interest therein, shall be sold by the sheriff at public auction to the highest bidder for cash, between the hours of ten in the morning and four in the afternoon on any Monday after the fourteenth day of October and before the twenty-third day of November: Provided, that no such unredeemed tract or lot, or any unredeemed part thereof or undivided interest therein, shall be sold upon any bid or for any sum less than the total amount of taxes, interest and charges then due: Provided, however, that at any such sale held after the thirtieth day of June, one thousand nine hundred sixty-five, each unredeemed tract or lot, and each unredeemed part of a tract or lot or interest herein, shall be offered for sale and sold in entirety as such tract or part thereof or interest therein is described and constituted as a unit or entity in the list and notice prescribed in section two [§ 11A-3-2] of this article: Provided further, that no part or interest in any unredeemed tract or lot, or any part thereof or interest therein, that is less than the entirety of such unredeemed tract, lot or part or interest, as the same is described and constitued as a unit or entity in said list and notice, shall be offered for sale or sold at such sale. If the sale shall not be completed on the day designated in the notice for the holding of such sale, it shall be continued from day to day between the same hours until disposition shall have been made of all the land. (1941, c. 117; 1961, c. 142; 1965, c. 160.)

§ 11A-3-6. Purchase by State.

If no person present bids the amount of taxes, interest and

charges due on any real estate offered for sale, the sheriff shall purchase it on behalf of the State for the amount so due. (1941, c. 117)

§ 11A-3-7. Title acquired by State.

Upon such purchase by the State, title to the real estate sold shall without any deed be vested in the State, subject, however, to the right of redemption provided for in the following section [§ 11A-3-8]. (1941, c. 117.)

§ 11A-3-8. Redemption from purchase by or forfeiture to State; lands made irredeemable.

The former owner of any real estate so purchased by the State, or any other person who was entitled to pay the taxes thereon, may redeem such real estate from the auditor at any time with eighteen months after the date of such purchase. Thereafter such real estate shall be irredeemable and subject to transfer or sale under the provisions of sections 3 and 4, article XIII of the Constitution.

The former owner of any real estate forfeited to the State for nonentry, or any other person who was entitled to pay the taxes thereon, may redeem such real estate from the auditor at any time prior to its certification by the auditor for sale for the benefit of the school fund as provided in article four [§ 11A-4-1 et seq.] of this chapter, but such redemption shall be subject to any prior transfer under the provisions of section 3, article XIII of the Constitution.

In order to redeem the person seeking redemption must pay to the auditor such of the following amounts as may be due: (1) The taxes, interest and charges for which the real estate was sold, with interest at the rate of twelve percent per annum from the date of sale. (2) All taxes assessed thereon for the year in which the sale occurred, with interest at the rate of twelve percent per annum from the date on which they became delinquent, except when such taxes are currently due and payble to the sheriff. (3) All taxes except those for the current year which would have been assessed thereon since the sale had the sale not occurred, or which, in the case of land forfeited for nonentry, would have been assessed thereon had the land been properly entered, with interest at the rate of twelve percent per annum from the date on which they would have become

delinquent. (4) The fee provided by the following section [§ 11A-3-9] for the issuance by the auditor of the certificate of redemption.

In computing the amount due under number three on real estate purchased by the State, the auditor shall use as the basis for computation the classification and valuation placed thereon by the assessor for each year since the sale. If such valuation and classification have not bee made, he shall use the last valuation and classification appearing on the property books. In computing the amount due under number three on real estate forfeited for nonentry, the auditor shall use as the basis for computation such classification and valuation as may, at the request of the auditor or the person redeeming, be certified to the auditor by the assessor as the classification and valuation which in his opinion would be proper for each year of nonentry.

In the case of partial redemption, he must pay only that proportion have not been made, heshall use the last valuation and classification appearing on the property books. Incomputing the amount due under number three on real estate forfeited for nonentry, the auditor shall use as the basis for computation such classification and valuation as may, at the request of the auditor or the person redeeming, be certified to the auditor by the assessor as the tion nine [§ 11A-1-9] or of section ten [§ 11A-1-10], article one of this chapter, have been complied with, except that instead of presenting the assessor's certificate to the sheriff as therein required, the person redeeming shall present it to the auditor, who, after making the necessary changes in the land book, and in the record of delinquent lands kept in his office, shall compute the taxes due on the part or interest redeemed. (1941, c. 117; 1947, c. 160.)

§ 11A-4-9. Auditor to certify list of lands to be sold; lands heretofore certifed made irredeemable and subject to transfer or sale.

On or after the first day of May and on or before the first day of October of each year, the auditor shall certify to the circuit court of each county a list of all lands in the county subject to sale under this article, except that forfeited, escheated, or waste and unappropriated lands may be certifed by the auditor at any time after they are brought to his attention. He shall note the fact of certification on

the land record in his office. Upon completion of a list for certification, a charge of one dollar shall be added to the taxes, interest and charges already due on each item listed, to cover the costs incurred by the auditor in the preparation of the list, and in the event of sale or redemption, the same shall be collected and paid into the operating fund provided for in this article.

Escheated lands and waste and unappropriated lands shall be listed separately. The list shall be arranged by districts and, except in the case of waste and unappropriated lands, alphabetically by name of the former owner. The list shall state as to each item listed the information required by section six [§ 11A-4-6] of this article to be set forth in the land record in the auditor's office, and shall specify as to each tract listed as forfeited or delinquent the amount of taxes and interest due or chargeable thereon on the date of certification, the publication and other charges due, with interest, and the total currently due. The specification of taxes due or chargeable shall as to delinquent land commence with those for nonpayment of which it was sold, and as to forfeited land with those properly chargeable to it for the first year of nonentry.

All items certified to each circuit court shall be numbered consecutively, and all subsequent orders, entries, applications or proceedings under this article in respect to any item shall refer to its number and to the year of certification. All tracts, lots, or parcels sold to the State as a unit may be treated by the auditor as a single item for purposes of certification. Subject to the provisions of this section, the auditor shall prescribe a form for the list and shall provide in such form adequate space to show the subsequent history and final disposition of each item certified.

The list shall be made in quadruplicate. The auditor shall keep the original and shall send one copy to the clerk of the circuit court, one to the clerk of the county court, and one to the deputy commissioner. The clerk of the ciurcuit court and the clerk of the county court shall each bind his copy in a permanent book to be labeled "Report of State Commissioner of Forfeited and Delinquent Lands" and the clerk of the county court shall note the fact of the certification of each item on his record of delinquent lands. Such copies shall become permanent records, and shall be preserved as such in the offices of the auditor, the county clerk and the circuit clerk.

All forfeited or delinquent lands heretofore certified by the auditor to the circuit courts under the provisions of former law may be redeemed at any time on or before the thirtieth day of June, one

thousand nine hundred forty-seven, by paying to the sheriff upon order of the deputy commissioner the amount required for redemption under the provisions of chapter one hundred forty, acts of the legislature, regular session, one thousand nine hundred forty-five, and for this purpose, and no other, such provisions in respect to redemption shall remain in full force and effect until the thirtieth day of June, one thousand nine hundred forty-seven. Thereafter, the deputy commissioner shall allow no further redemptions, and all such delinquent land shall, on the first day of May, become irredeemable and subject ot transfer or sale under the provisions of sections 3 and 4, article XIII of the Constitution. Thereafter, the deputy commissioner shall proceed as provided in this article to institute suits for the sale of lands heretofore certifed by the auditor which are subject to sale under the provisions hereof. (1947, c. 160; 1961, c. 142.)

§ 11A-4-10. Suit for sale of lands.

As soon as possible after receipt of the certified list, the deputy commissioner, shall institute in the circuit court of his county a suit or suits in chancery, in the name of the State of West Virginia, for the sale for benefit of the school fund of all the lands included in the list. Except as hereinafter provided, not more than twenty-five items as certified by the auditor shall be included in one suit, and whenever the deputy commissioner deems it advisable a suit may be instituted in respect to any number less than twenty-five. In the case of forfeited or delinquent undivided interests in a single tract or lot, one suit may be brought for the sale of all such interests regardless of the number involved. In a suit for the sale of any escheated lands or of any waste and unappropriated lands, no lands of any other sort shall be included. (1947, c. 160).

§ 11A-4-12. Service of process by publication; failure to name person as defendant; failure to obtain personal service in prior suits.

Upon the institution of a suit as provided in section ten [§ 11A-4-10] of this article, the clerk of the circuit court shall enter an order of publication, without the filing of any affidavit by the deputy commissioner as required in other cases. Such order of publication

shall give the style of the suit, as, State of West Virginia v. A.B. et al.; shall state that the object of the suit is to obtain a decree of the circuit court ordering the sale for the benefit of the school fund of all lands included in the suit; shall list all such lands, setting forth as to each item its local description, the former owner in whose name the land was forfeited, or was returned delinquent and sold, or escheated, as the case may be, and the names of such other defendants as may be interested therein; and shall require all the named defendants, and all unknown parties who are or may be interested in any of the lands included in the suit to appear within one month after the date of the first publication thereof and do what is necessary to protect their interests.

The order shall be published as a Class III-0 legal advertisement in compliance with the provisions of article three [§ 59-3-1 et seq.], chapter fifty-nine of this Code, and the publication area for such publication shall be the county. The cost of such publication shall be charged ratably to each item listed in the suit, and shall be taxed to the State as part of its costs in the suit and paid as hereinafter provided.

In view of the fact that the State has absolute title to all forfeited land, to all land sold to the State for nonpayment of taxes and become irredeemable, to all escheated land, and to all waste and unappropriated land, and must under the Constitution have such an absolute title before the land may be sold for the benefit of the school fund; and in view of the fact that the former owner of any such land, or any person claiming under him, has no further interest therein nor rights in respect thereto except such privilege of redemption as may be extended to him by the legislature as an act of grace; and in view of the further fact that all parties known and unknown who may claim an interest in any of the lands included in the suit are given notice thereof by the order of publication provided for above; therefore, the legislature deems it both expedient and necessary to provide that failure to name any such person as a defendant shall in nowise affect the validity of any of the proceedings in the suit for the sale of the State's title to such land; and in view of the fact that the supreme court of appeals in a decision just rendered has held that there is no constitution requirement that the former owner or any other interested person be personally served with process in a suit for the sale for the benefit of the school fund of lands that are and must be the absolute property of the State; and in view of the further fact that in its last previous enactment of this section the legislature

had no intention of requiring that personal service of process on named defendants in such a suit should be a mandatory condition precedent to the validity of any step or proceeding in such suit, but on the contrary expressly stated that failure to serve the summons on any named defendant should in nowise affect the validity thereof; now therefore, the legislature also deems it both expedient and necessary to provide that the failure to obtain such personal service on any named defendant in any suit instituted under the provisions of this article prior to the effective date hereof [March 11, 1949] shall in no way affect the validity of any step or proceeding in any such suit or the validity of the title acquired by the purchaser of land sold under any decree made or to be made in any such suit. (1947, c.160; 1949,c. 134; 1967, c. 105.)

§ 11A-4-18. Application for permission to redeem.

The former owner of any forfeited or delinquent land, or any other person who was entitled to redeem such land under the provisions of section eight [§11A-3-8], article three of this chapter, may file his petition in such suit with the circuit court or the judge thereof in vacation, at any time before confirmation of sale thereof requesting permission to redeem such land to the extent that title thereto remains in the State. The court or the judge thereof in vacation may by proper decree, permit the petitioner to redeem the land upon payment to the sheriff of the total amount of taxes, interest and charges properly due or chargeable thereon under the provisions of this article, which amount shall be fixed by the court or the judge thereof in vacation, in the order.

Upon payment being made, the court or the judge thereof in vacation, shall enter a decree declaring the redemption of such land by the petitioner, so far only as the title thereto remains in the State, and dismissing the suit in respect thereto. If redemption was allowed after sale, the decree shall also direct the sheriff to return the purchase money to the purchaser. Such decree shall operate as a release of all the right, title and interest of the State in and to such land, but shall in nowise affect or impair any right, title or interest which any other person may have therein.

Any redemption, which may have been heretofore had by a former owner of real estate, pursuant to permission, granted such former owner by a vacation order in any such suit, is hereby declared valid. (1947, c. 160; 1951, c. 192; 1971, c. 172.)

§ 11A-4-22. Decree of sale.

Whenever, in respect to any land included in the suit, the court shall find as alleged in the bill that the land is subject to sale for the benefit of the school fund, it shall enter a decree ordering that such land be sold by the deputy commissioner at public auction to the highest bidder. In every such decree the court shall fix the time and place of the sale.

The court may order the sale of any one or more of the items included in the suit without waiting for the termination of the suit as to other items included therein. It may also order that lands included in several suits be sold at the same sale. (1947,c.160)

§ 11A-4-23. Notice of sale.

In order to encourage attendance and bidding at the sale, the deputy commissioner shall, beginning at least fifteen days before the day on which the court has ordered that any lands be sold, publish a list of all such lands as a Class III-0 legal advertisement in compliance with the provisions of article three [§ 59-3-1 *et seq.*], chapter fifty-nine of this Code, and the publication area for such publication shall be the county. At the head of the list shall be a notice of the sale in form or effect as follows:

Notice is hereby given that, pursuant to the order of the Circuit Court of ..... County, the following described tracts or lots of land, or undivided interests therein, will unless sooner redeemed be sold for cash to the highest bidder. Such sale will be held at ..... day of ....., 19.....

The list shall set forth as to each item its quantity, local description and, except in the case of waste and unappropriated lands, the name of the former owner. The cost of such publication shall be taxed to the State as part of its costs in the suit and shall be paid as hereinafter provided. (1947,c.160;1967,c.105.)

§ 11A-4-32. Deed to purchaser; record.

Whenever ordered to do so as provided in the preceding section [§ 11A-4-31], the deputy commissioner shall make and deliver to the person entitled thereto a deed in form or effect as follows:

This deed made this ..... day of ....., 19....., by and between ....., deputy commissioner of forfeited and delinquent lands for ..... County, West Virginia, acting for and on behalf of the State of West Virginia, grantor, and ..... purchaser, (or ....., heir, devisee or assignee of ....., purchaser,) grantee, witnesseth that

WHEREAS, In pursuance of and in accordance with the statutes in such case made and provided, the above named deputy commissioner did, by order of the Circuit Court of ..... County, in the month of ....., in the year 19....., sell the real estate, hereinafter mentioned and described, for the benefit of the school fund, and ....., (here insert name of purchaser) for the sum of $....., that being the amount of purchase money paid, did become the purchaser of such real estate (or of an undivided ..... interest in such real estate) which was sold to the State for nonpayment of taxes in the name of .....; (or which was forfeited to the State for nonentry in the name of .....; or which escheated to the State in the name of .....; or which was waste and unappropriated land belonging to the State); and

WHEREAS, By an order entered on the ..... day of ....., 19....., in the case of State of West Virginia v. (A.B., et al.), the Circuit Court of ..... County has confirmed the sale and and has ordered that this deed be executed.

Now, therefore, the grantor, for and in consideration of the premises and in pursuance of the statute, doth grant and convey unto ....., grantee, his heirs and assigns forever, the real estate so purchased, situate in the County of ....., bounded and described as follows;.....

Witness the following signature:

.....

Deputy Commissioner of Forfeited and
Delinquent Lands for ..... County

After execution and acknowledgment of the deed, the deputy commissioner shall ascertain from the clerk of the county court the total amount of the transfer fee, the fee for recording the deed, and if the grantee was an assignee of the purchaser, the fee for recording the assignment, and shall notify the grantee to pay such amount to the clerk of the county court. Upon such payment and upon payment by the grantee to the deputy commissioner of a fee of twenty dollars as his compensation for preparing and executing the deed, the deputy commissioner shall have the deed and the assignment, if

any, recorded by the clerk of the county court before delivery of the deed to the grantee. The purchaser shall have the right to examine the deed before it is recorded.

The clerk of the county court shall index the deed in the grantor's index under the name of the former owner mentioned in the deed as well as under the name "State of West Virginia." (1947, c. 160; 1971, c. 172.)

§ 31-1-15. Secretary of state constituted attorney-in-fact for all corporations; manner acceptance or service of notices and process upon secretary of state; what constitutes conducting affairs or doing or transacting business in this State for purposes of this section.

The secretary of state is hereby constituted the attorney-in-fact for and on behalf of every corporation created by virtue of the laws of this State and every foreign corporation authorized to conduct affairs or do or transact business herein pursuant to the provisions of this article, with authority to accept service of notice and process on behalf of every such corporation and upon whom service of notice and process may be made in this State for and upon every such corporation. No act of such corporation appointing the secretary of state such attorney-in-fact shall be necessary. Immediately after being served with or accepting any such process or notice, of which process or notice two copies for each defendant shall be furnished the secretary of state with the original notice or process, together with a fee of two dollars, the secretary of state shall file in his office a copy of such process or notice, with a note thereon endorsed of the time of service, or acceptance, as the case may be, and transmit one copy of such process or notice by registered or certified mail, return receipt requested, to the person to whom notice and process shall be sent, whose name and address were last furnished to the state officer at the time authorized by statute to accept service of notice and process and upon whom notice and process may be served; and if no such person has been named, to the principal office of the corporation at the address last furnished to the state officer at the time authorized by statute to accept service of process and upon whom process may be served, as required by law. No process or notice shall be served on the secretary of state or accepted by him less than ten days before the return day thereof. Such corporation shall pay

the annual fee prescribed by article twelve [§ 11-12-1 et se.], chapter eleven of this Code for the services of the secretary of state as its attorney-in-fact.

Any foreign corporation which shall conduct affairs or do or transact business in this State without having been authorized so to do pursuant to the provisions of this article shall be conclusively presumed to have appointed the secretary of state as its attorney-in-fact with authority to accept service of notice and process on behalf of such corporation and upon whom service of notice and process may be made in this State for and upon every such corporation in any action or proceeding described in the next following paragraph of this section. No act of such corporation appointing the secretary of state as such attorney-in-fact shall be necessary. Immediately after being served with or accepting any such process or notice, of which process or notice two copies for each defendant shall be furnished the secretary of state with the original notice or process, together with a fee of two dollars, the secretary of state shall file in his office a copy of such process or notice, with a note thereon endorsed of the time of service or acceptance, as the case may be, and transmit one copy of such process or notice by registered or certified mail, return receipt requested, to such corporation at the address of its principal office, which address shall be stated in such process or notice. Such service or acceptance of such process or notice shall be sufficient if such return receipt shall be signed by an agent or employee of such corporation, or the registered or certified mail so sent by the secretary of state is refused by the addressee and the registered or certified mail is returned to the secretary of state, or to his office, showing thereon the stamp of the United States postal service that delivery thereof has been refused, and such return receipt or registered or certified mail is appended to the original process or notice and filed therewith in the clerk's office of the court from which such process or notice was issued. No process or notice shall be served on the secretary of state or accepted by him less than ten days before the return date thereof. The court may order such continuances as may be reasonable to afford each defendant opportunity to defend the action or proceedings.

For the purpose of this section, a foreign corporation not authorized to conduct affairs or do or transact business in this State pursuant to the provisions of this article shall nevertheless be deemed to be conducting affairs or doing or transacting business herein (a) if such corporation makes a contract to be performed, in whole or in part,

by any party thereto, in this State, (b) if such corporation commits a tort in whole or in part in this State, or (c) if such corporation manufactures, sells, offers for sale or supplies any product in a defective condition and such product causes injury to any person or property within this State notwithstanding the fact that such corporation had no agents, servants or employees or contacts within this State at the time of said injury. The making of such contract, the committing of such tort or the manufacture or sale, offer of sale or supply of such defective product as hereinabove described shall be deemed to be the agreement of such corporation that any notice or process served upon, or accepted by, the secretary of state pursuant to the next preceding paragraph of this section in any action or proceeding against such corporation arising from, or growing out of, such contract, tort, or manufacture or sale, offer of sale or supply of such defective product shall be of the same legal force and validity as process duly served on such corporation in his State. (1905, c. 39, § 1; 1907, Ex. Sess., c 9; 1915, 2nd Ex. Sess., c. 3; Code 1923, c. 54, § 24a; 1945, c. 24; 1947, c. 41; 1947, Ex. Ses., c 2; 1957, c. 20; 1959, c. 20; 1974, c. 13; 1975, c. 118.)

§ 31-1-56a. Annual report of domestic and foreign corporations; filing.

(a) Each domestic corporation, and each foreign corporation authorized to conduct affairs or do or transact business within this State, shall file with the secretary of state and with the tax commissioner, within the time prescribed by this article, an annual report setting forth:

(1) The name of the corporation and the state or county under the laws of which it is incorporated.

(2) The address of its principal office; and, if one has been appointed, the name and address of the person to whom shall be sent notice and process served upon or service of which is accepted by the secretary of state, as provided by sections fifteen and fifty-six [§§ 33-1-15 and 31-1-56] of this article.

(3) A brief statement of the character of the affairs which the corporation is actually conducting, or the business it is doing or transacting, in this State.

(4) The names and respective addresses of the directors and officers of the corporation.

(5) In the case of a foreign corporation, the date of incorporation and the following additional information: (i) The date of the certificate of the secretary of state authorizing it to do business in this State; (ii) the name of its officer, if any, charged with the duty of making returns of its property for taxation; (iii) the number of shares of its authorized capital stock having a par value and the par value of each share, and the number of its issued and outstanding shares and the par value of each share; (iv) the number of shares of its authorized capital stock having no par value, the number of shares of such stock authorized to be issued and the considerations fixed for the issue of each share of the same by its articles of incorporation or board of directors, and the number of shares thereof issued and outstanding; (v) the value of the property owned and used by such corporation within this State, where situate, of what it consists, and the number of acres of land it holds in this State, and the value of its property owned and used without this State; and (vi) the proportion of its capital stock which is represented by property owned and used in the State of West Virginia.

(b) Such annual report shall be made on forms prescribed and furnished by the secretary of state, and the information therein contained shall be given as of the date of the execution of the report. It shall be executed and verified by the corporation by its president, a vice president, secretary or treasurer, or an assistant secretary or treasurer, or, if the corporation is in the hands of a receiver or trustee, it shall be executed on behalf of the corporation by such receiver or trustee.

(c) Such annual report of a domestic or foreign corporation shall be delivered to the secretary of state and the tax commissioner in duplicate, between the first day of January and the thirty-first day of March of each year, except that the first annual report of a domestic or foreign corporation shall be filed between the first day of January and the thirty-first day of March of the year next succeeding the calendar year in which its certificate of incorporation or its certificate of authority, as the case may be, was issued by the secretary of state. Proof to the satisfaction of the secretary of state that prior to the thirty-first day of March such reports were deposited in the United States mail in sealed envelopes, properly addressed to the secretary of state and the tax commissioner, with postage prepaid, shall be deemed compliance with this requirement. If the secretary of state finds that such report conforms to the requirements of this article, he shall file the same. If he finds that it does not so conform, he shall

promptly return the same to the corporation for any necessary corrections, which corrections shall be made and the corrected report be returned by the corporation to the secretary of state and tax commissioner within thirty days, and upon receipt of such corrected report the secretary of state shall file the same. (1975, c. 118.)

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No. 82-853

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

RUSSELL CREEK LAND COMPANY
and BBF, INC.,
Petitioners,

Vs.

CHARJUAN, INC.,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

JAMES ALLAN COLBURN
Baer & Colburn, L.C.
731 Fifth Avenue
Huntington, West Virginia
(305) 523-8451

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IN THE
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RUSSELL CREEK LAND COMPANY
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BRIEF IN RESPONSE TO PETITION
FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF CABELL COUNTY,
WEST VIRGINIA

DECISION BELOW

The lengthy finding of fact, conclusions of law and order of the Circuit Court of Cabell County is set forth accurately in the Petition.

QUESTION PRESENTED

There are no questions for review, requiring granting of a Writ of Certiorari to the Circuit Court of Cabell County, West Virginia.

STATEMENT OF THE CASE

The Circuit Court of Cabell County, West Virginia, decided this matter by Order dated November 6, 1981, after a hearing held on November 20, 1980. This decision was appealed to the West Virginia Supreme Court of Appeals twice and denied both times. The petitioners were the landowner and tenant of a parcel of improved real estate located in Cabell County, West Virginia. The petitioners assert a denial of due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution by alleging that certain provisions of the West Virginia Code are unconstitutional. This Court's

jurisdiction is sought under 28 U.S.C. Subsection 1257(3) and Rule 17.1(c) of the Rules of the United States Supreme Court.

STATEMENT OF THE FACTS

Paramount to an understanding of the issues in this case is the time sequence of various events, the duties of ownership of real property, and the failure to execute those duties by the petitioners herein.

Russell Creek was the fee simple owner of the subject real estate which was purchased in August of 1963. At that time, Russell Creek leased the subject property to BBHE, Inc., (a predecessor by merger of BBF, Inc.). The obligation to pay the real estate taxes assessed by the Cabell County Assessor was made a provision of this Lease and was the responsibility of BBHE and subsequently BBF under that Lease. The taxes were paid on the subject real estate

from 1963 to 1974, inclusive. The taxes were not paid or tendered for 1975, 1976, 1977, 1978 and 1979. No effort was made to pay these taxes or to contact the billing or tax collecting authority (the Cabell County Sheriff) by Russell Creek or BBF during this time, notwithstanding the written tax statement mailed to BBF in September, 1975.

BBF, Inc., a national fast food service chain operating out of Columbus, Ohio, in fact, paid the 1973 and 1974 taxes on September 14, 1974, and the Cabell County Sheriff mailed a check for a tax refund to BBF as a result of an overpayment. The 1973 taxes were delinquent when paid by BBF. Between July 15 and August 1, 1975, the Cabell County Sheriff mailed notice of the taxes due to BBHE, Inc., the predecessor corporation to BBF, Inc., receipt of the mailed notice was not denied by BBF. The subject property

became delinquent for taxes on May 1, 1976. On May 15, 1976, the first notice of publication of the delinquent taxes was prepared by the Cabell County Sheriff and was published as a class 1-0 legal advertisement. On September 22, 1976, a second list of delinquent real estate taxes for 1975 calendar tax year was prepared and published likewise in the newspaper. On October 18, 1976, a tax sale of various lands delinquent for taxes in 1975 was held by the Cabell County Sheriff. This property was not purchased by anyone at the sale and pursuant to West Virginia Code Section 11(a)-3-6, the Cabell County Sheriff on behalf of the State of West Virginia bid in the property for the taxes due, $1,345.78. From October 18, 1976, until September 30, 1978, when the property was certified by the West Virginia State Auditor to be sold for the benefit of the School Fund, the property was absolutely

redeemable by Russell Creek or BBF upon the payment of all past due taxes, interest and charges due on the said real estate. After the property was certified to be sold for the benefit of the school fund under West Virginia Code Section 11A-4-1, et. seq. until April 3, 1979, the property was redeemable as a matter of grace by either BBF or Russell Creek. Taxes for the year 1975 were computed on a fiscal year basis between July 1, 1974 to June 30, 1975. They were not payable until after July 1, 1975. From July 1, 1975, until April 3, 1979, no offer, contact, payment, or other communication was made by either Russell Creek or BBF to pay the real estate taxes on the subject property.

On these facts BBF, Inc., and Russell Creek now complain that the West Virginia statutory scheme denies them due process of law as guaranteed them by the United States Constitution and Amendment

XIV thereto. The petitioners assert that the West Virginia statutes deny them notice and an opportunity to be heard both as to the time, date and place of the Sheriff's sale and a failure to provide notice of the absolute right of redemption after the property passed to the State of West Virginia under West Virginia Code Section 11A-3-6. This is plainly a misapprehension of the due process clause of Amendment IV of the United States Constitution and the West Virginia statutes.

ARGUMENT

A. Procedural Due Process:

The requirements of notice and an opportunity to be heard as defined by Mullane v. Central Hanover Bank and Trust Company, 399 U.S. 306 (1950) refer to a judicial proceeding at which a right or property interest will be adjudicated. In

that proceeding, either in rem or in personam Mullane holds that publication is not sufficient notification if the person or persons to be affected are known and his address can be obtained so that he receives personal service. In the case at bar, there was no judicial proceeding and none was required.

The amount of taxes which the petitioners owed on the subject real property in Cabell County was a matter of mathematical calculation which requires no hearing. See Hancock v. Muskogee, 250 U.S. 454 (1919); People's National Bank v. Marye, 107 F. 570 (4th Cir.) modified on other grounds 191 U.S. 272 (1901).

When the taxes became delinquent, the Sheriff, pursuant to statute, published both in the newspaper and in notices on the courthouse door.

At any time during the years in question, either petitioner could have attempted to pay the taxes and have been told of the forfeiture to the state and of its right to redeem the property. But for years, neither party even attempted to do so, notwithstanding they actively engaged in the fast food business at that address.

In the instant case, Russell Creek's property became vested in the State of West Virginia (11A-3-6), when the property is advertised for sale for delinquent taxes and there are no bidders thereon. The subject property was not purchased by a third party at the Cabell County Sheriff's tax sale.

This provision is similar to escheat statutes. See Christianson v. King County, 239 U.S. 356 (1915); Application of the People of the State of New York, 138 F.Supp 661 (1956); State v. Standard Oil Company, 5 N.J. 281, 74 A.2d 565, aff'd 341 U.S. 428

(1950). The duty is on the landowner to pay his taxes. The landowner's or his assignees failure to perform a statutorily required act cannot give the landowner or his assignee the right to shift the burden to the State of West Virginia to keep him notified as to when to pay his taxes.

In addition, respondent notes that in this case, for the years prior to 1975, the taxes were paid by BBHE, Inc., or BBF, Inc. The address of BBHE, Inc., was known. BBHE, Inc., did in fact receive written, mailed notice of the taxes due for 1975 from the Sheriff of Cabell County, West Virginia.

It has long been the law that the State may sell land for taxes; and notice by publication is not violative of due process. Leigh v. Green, Neb. 1904, 24 S. Ct. 390, 193 U.S. 92, 48 L.Ed. 623; Outlook Irr. Dist. v. Fels, 1934 28 P.2d 996, 176 Wash. 211; Spitcaufsky v. Hatten,

1944 182 S.W.2d 86, 353 Mo. 94; This matter was recently denied certiorari by this Court. Billingsley v. Wallace, 1974 297 So.2d. 362, 292 Ala. 538, certiorari denied, 95 S.Ct. 834.

The contention that statutory requirements are insufficient to give due process after a reasonable period in which to act cannot be sustained. Kaufman v. Gross & Co., 1979, 591 P.2d 1229, 23 C.3d. 750, 153 Cal. Rptr. 577. In this case the petitioners had over three (3) years in which to cure default.

It is a long established principle of law in the United States that when a party owns property, it is the responsibility of the owner to preserve and protect it.

In the words of Chief Justice John Marshall in The Mary (U.S.) 9 Cranch 126, 144, 3 L.Ed. 678, 684, "It is the part of common prudence for all persons who have any

interest in [a thing], to guard that interest by persons who are in a situation to protect it." Cited in Mullane, supra, 316.

The petitioners knew that taxes were owed on the property, knew approximately when they were due and knew to whom they were payable. The petitioners, jointly or severally, were in a situation to protect their interests in the subject property. They failed to do so and now maintain that the State is at fault for their failure to pay taxes for the last 3½ years they owned and/or operated a fast food restaurant on the subject property.

In the consideration of these questions presented to this Court, another question must be asked.

> "What could have been done by BBF or Russell Creek, even if there had been hand delivered personal notification to the Presidents of both BBF and Russell Creek concerning both matters raised in the questions presented?"

The answer is obvious. They could have paid the taxes. There was no appearance that could have been made. There was no legal determination to challenge. There was no pleading to respond to. There was nothing to do except to pay the taxes. This is exactly what could have been done without such hand delivered personal notification to the Presidents of both corporations. The responsibility is not on the State of West Virginia to see that both domestic and foreign corporations properly manage their businesses and pay their taxes. The petitioners lost nothing as a result of any "lack of notice and opportunity to be heard." They simply failed to pay their taxes to the Cabell County Sheriff as they had done for the previous eleven (11) years and could have done for the more than three and a half (3-1/2) years in question and saved their property.

Under the particular facts in this case, Russell Creek and BBF have waived and are estopped from claiming injury herein. Both Russell Creek and BBF were required by the State of West Virginia to annually report to the State of West Virginia what properties they owned and to assign a value for those properties for the purposes of taxation by Cabell County, West Virginia. These duties to report and their previous eleven (11) years of a history of paying the taxes and their failure to deny any knowledge of their responsibility to pay real estate taxes overwhelmingly shows that the petitioners herein do not have requisite standing to assert a constitutional challenge to the West Virginia statutes.

B. Substantive Due Process.

There is no substantive due process question presented in either question because of the State's overriding interest

in requiring owners of real property to timely pay their taxes. This state interest is set forth in West Virginia Code provision 11A-3-1. The only consideration is whether or not there is a reasonable period of time in which the property owner can cure his default.

Under the West Virginia statutes, the property owner has approximately two and a half (2-1/2) years if the statutory timetable is followed before the property becomes irredeemable. This right would exist for this period of time, even if the property had been sold to a third party at the Sheriff's sale. Under the facts in this case, both Russell Creek and BBF had the right to cure this default and pay the taxes and/or redeem the property from the State of West Virginia from July 1, 1975, until September 30, 1978 or some three (3) years and three (3) months.

CONCLUSION

For the foregoing reasons, the respondents respectfully submit that there is no federal constitutional questions involved and that any loss suffered by the petitioners herein is a direct result of their negligent operation of their respective businesses. They voluntarily became the owners of property in the State of West Virginia; they voluntarily used the property to make money in the State of West Virginia; and they voluntarily failed to make their annual tax payments to the State of West Virginia after eleven (11) years of so doing. For those reasons, it is respectfully submitted that the requested Writ of Certiorari should be denied.

Respectfully submitted,

James Allan Colburn
Counsel for respondents

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-853

RUSSELL CREEK LAND COMPANY
AND BBF, INC.,

Pe tioners,

vs.

CHARJUAN, INC.,

Respondent

AFFIDAVIT OF FILING AND SERVICE

I, James Allan Colburn, counsel for the above-named respondent, do hereby certify that I did file the attached Brief in Opposition to Petition for Writ of Certiorari, by depositing same in the United States Post Office with first class

postage prepaid and addressed to the Clerk of the United States Supreme Court within the time allowed for filing.

I do further certify that I did serve copies of the attached Brief in Opposition to Petition for Writ of Certiorari, by depositing same in the United States mails, first class postage prepaid, addressed to each of the attorneys at their addresses listed below, on this the 7th day of March, 1983:

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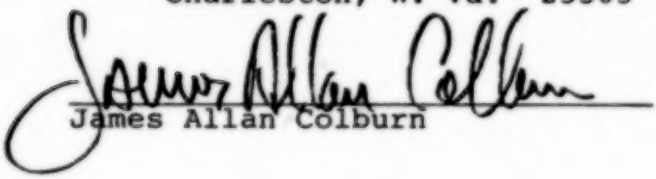

James Allan Colburn

STATE OF WEST VIRGINIA,

COUNTY OF CABELL, TO-WIT:

I, Mindy Ann Napier, a Notary Public in and for the County and State aforesaid, do hereby certify that James Allan Colburn, whose name is signed to the foregoing writing, has this day acknowledged the same before me in my said County, on this the 7th day of March, 1983.

My commission expires April 18, 1990.

Mindy Ann Napier
NOTARY PUBLIC